Supreme Court of the United States

OCTOBER TERM, 1954

No. 52

DANIEL SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONER.

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INTRODUCTION.

The issues raised by the grant by this Court of the writ of certiorari require for their consideration a thorough understanding of the proceedings below, both in the trial court and in the Court of Appeals. The Government in its Brief in this Court seems to have misconceived the nature of these proceedings in some important aspects, and it is the purpose of this Reply Brief initially to clarify these misconceptions before contesting briefly the Govern-

ment's contentions on the four issues before the Court.

The petitioner readily concedes the validity of a theory of prosecution stated by the Government in its Brief (Govt. Br. 22, 56, 59): if the petitioner filed false income tax returns, wilfully and knowingly stating that the taxable income reported thereon was less than it truly was, it would not matter who owned the assets acquired with that income, nor, indeed, whether the income was his or his wife's. The petitioner cannot, however, concede the further assumption by the Government that the prosecution at the trial proved a case against the petitioner under that theory.

In his appeal to the Court of Appeals from the conviction in the District Court the petitioner argued extensively the many ways in which the prosecution had failed to prove the petitioner guilty under the theory as stated by the Government and further suggested that the basis of this failure lay in a fundamental misunderstanding by the prosecution of this theory. The evidence introduced at the trial was analyzed in detail for sufficiency, and it was argued not only that the relevant and competent evidence against the petitioner was insufficient to sustain the conviction, but also that prejudicial errors had been made by the judge in his conduct of the trial and in his charge to the jury.

The attitude of the trial judge, and of the prosecution, toward the admissibility against the petitioner of evidence of assets owned by his wife was, for example, one of the points strongly contested before the Court of Appeals. Counsel for the petitioner had asked that the testimony of the first witness on this point be limited to Eva Smith and excluded as to the petitioner, had observed that he would have the same request throughout, and suggested he wouldn't "bother to request my objection be noted each time." In response, the trial judge stated: "All right.

I will protect your interests each time." (R. 30). The prosecution made no objection at this time. The point was not again raised on the first day of the trial; the same request was made and granted as to the first such witness on the second day (R. 106), again without objection by the prosecution. Finally, as a result of counsel's objection to the charge, the judge instructed the jury "not to consider any of the evidence that was put in against Eva but only such evidence as applied to Daniel Smith" (R. 214).

The Government directed the attention of the Court of Appeals to other portions of the Record which, it was contended, indicated that the judge had limited the evidence to Eva Smith only *de bene*, and had later admitted it against the petitioner.[1] The Court of Appeals dealt with this issue in one paragraph, stating that the judge had told the jury that such evidence might later be connected with the petitioner and adding, "the evidence we have mentioned together with all the other evidence introduced, clearly was sufficient for the jury to infer appellant's ownership of *the assets listed in his net worth statement*." (R. 263; italics added). It is submitted, especially in view of the trial court's supplementary instruction to the jury referred to above, that the Court of Appeals did not purport to rule that all of the evidence introduced at the trial was relevant and competent against the petitioner, and that no one yet knows what evidence was limited to Eva Smith.

Now, however, before this Court the Government has assumed that all of the evidence introduced in the case was admitted against the petitioner, regardless of the two rulings and the instruction of the trial court referred to above, and in spite of the inconclusive language employed by the Court of Appeals. For example, the evidence specific-

[1] This in itself raises an interesting procedural question. What happens to the right of cross-examination when evidence so excluded is later admitted?

ally objected to on the second day of the trial and limited to Eva Smith by the judge related to the purchase by Eva of a fur coat (R. 104-106). The Government has in its brief twice referred to this fur coat (Govt. Br. 13, 30) as part of the case against the petitioner. If the supplementary instruction to the jury by the trial judge (R. 214) meant anything, it meant that this evidence was not admitted against the petitioner.

Perhaps more important to an understanding of the proceedings in the District Court than the above considerations is the light that the circumstances related above shed on the conduct of the trial by the prosecution and the trial judge. No attempt was made by the prosecution to have the fur coat evidence admitted against the petitioner on the ground that he must have known about it, even though such an attempt would surely have been successful. Nor did the prosecution make any attempt to show that the petitioner had any knowledge of the acquisition by his wife of many of the other assets which she owned, assets of which he would have no reason to know. No attempt was made to show that his wife did not receive some or all of these assets as gifts from her family; indeed, the Government's investigation of Eva Smith was cursory and incomplete (R. 167-169).

Two of the four issues which the petitioner is now raising in this Court, *viz.* corroboration of the starting net worth and the admissibility of petitioner's net worth statement, were raised in the Court of Appeals, and, it is submitted, incorrectly decided in that Court. The other two contentions now being pressed by the petitioner arise out of the failure of the Court of Appeals to deal adequately with the issues therein raised by the petitioner, one of which was the admission of evidence discussed above. Petitioner has stated in the Petition for a Writ of Certiorari (Petition 12) and in his brief (Pet. Br. 17) his understanding that

the Court does not conceive it to be its function to review in detail alleged errors in the trial court which require an exhaustive search of the Record. The issues presented to this Court do not, therefore, include such questions. This does not, however, mean that the petitioner has admitted that the evidence independent of petitioner's net worth statement was sufficient, or even that much of it was competent, to sustain the conviction; this is the very question which he believes should be returned to the Court of Appeals for the determination which, so far, has not been made.

ARGUMENT

I. Corroboration of Petitioner's Starting Net Worth.

At the outset the petitioner would like to reject the Government's suggestion (Govt. Br. 26) that he understates his case when he bases it on the decision in *Calderon* v. *United States*, 207 F.2d 377 (9 Cir. 1953) (No. 25 this term in this Court). In his brief petitioner pointed out that the Court of Appeals did not look for specific corroboration of petitioner's starting net worth but rather for corroboration of the statement as a whole (Pet. Br. 22). The Government now again demonstrates at length that the statement as a whole was corroborated in some important respects (Govt. Br. 24-31). With this contention we have no present argument.

It is basic that no increase in net worth can be proven unless the net worth at the time immediately preceding the alleged increase is established. As the Government states, it is "a point to start from in establishing the ultimate fact" (Govt. Br. 27). As such, the Court of Appeals for the Ninth Circuit held in *Calderon* that the whole case against a defendant, whose guilt of tax evasion

is sought to be established by the net worth method, falls unless this point from which to start is adequately corroborated.

The Government states that the w[illegible]e problem is clouded by this "misconceived contention" (Govt. Br. 27) — the petitioner can only reiterate that he relies on the *Calderon* decision, that he has demonstrated that his position is at least as strong as Calderon's, and that he wishes the issue not to be clouded by the Government's suggestion that he should have taken a position which it then argues is untenable.

Finally, the Government has suggested that petitioner's contention that he was actually convicted by the jury on the basis of evidence independent of his admissions is inconsistent with his contention as to the lack of corroboration. (Govt. Br. 24, 28). However, petitioner's assertion that the jury reached its decision as a result of the record of the independent evidence placed on the blackboard before it has always been coupled with the contention that much of this evidence was improperly admitted, incompetent, and irrelevant. It is precisely this contention that petitioner seeks to have considered by the Court of Appeals.

II. The Admission in Evidence of the Financial Statement Signed by the Petitioner.

The Government's position under the second subdivision of the argument involves a misconception of the issue which was decided preliminarily by the trial judge on the petitioner's motion for the return of property and the suppression of evidence (R. 15) and subsequently framed by him for decision by the jury in his charge to the jury (R. 210). That issue was whether or not the treasury agent practised fraud in obtaining the financial statement Exhibit 20

from the petitioner and his accountant. Specifically, it was whether or not the treasury agent promised immunity from criminal prosecution while at the same time intending to prosecute. The crucial fact was the state of mind of the agent.

The pre-trial motion, filed pursuant to Rule 41 (e), Federal Rules of Criminal Procedure, asked that the financial statement signed by the petitioner be returned to him and be suppressed for use as evidence. The reason specified was that it was obtained from him in violation of his constitutional rights (R. 15). It was founded in law on the implications of *Centracchio* v. *Garrity*, 198 F.2d 382 (1 Cir. 1952), decided approximately five months prior to the filing of the motion in the case at bar.[2] In that case, the Court of Appeals affirmed the dismissal for want of equity of a taxpayer's petition prior to indictment to suppress evidence disclosed to treasury agents in reliance on the policy of the Treasury Department not to prosecute criminally taxpayers making voluntary disclosures. The Court approved as fully warranted by the testimony a finding by the district judge "that there was no evidence that at the time these disclosures were made the treasury officials did in fact contemplate any criminal prosecution of petitioner, and that therefore there was no basis for a finding that the Treasury agents intended all along to break some promise or declaration of policy, and obtained from petitioner the evidence in question by fraudulent misrepresentation of their intention in that regard." (198 F.2d at

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[2] As noted in the opinion (198 F.2d at 385), the taxpayer was indicted for tax evasion subsequent to the filing of the pre-indictment petition. The criminal case was *United States* v. *Centracchio*, Crim. No. 52-47 D. C. Mass. The docket entries in that case show that a motion to suppress was filed, was heard by the same judge who heard the pre-trial motion and presided at the trial in the case at bar, and was decided by him on February 13, 1953, three days prior to his denial of the motion in the case at bar (R. 3).

385). The emphasis elsewhere on the same page of the opinion on this deficiency in the testimony seemed to imply that the ruling that the taxpayer's constitutional rights had not been violated, would have been otherwise if the testimony had shown that the treasury agents had intended to defraud the petitioner.

A motion under Rule 41 (e) does not raise the question of the general admissibility of the evidence sought to be suppressed. By its terms, it establishes a remedy only for "a person aggrieved by an unlawful search and seizure". In practice, at least in the District of Massachusetts, e. g. *U. S.* v. *Weisman*, 78 F. Supp. 979, constitutional rights ordained by the Fifth Amendment as well as the Fourth Amendment have been adjudicated upon motions to suppress. But there is nothing in the language of the rule or in the decisions authorizing, let alone requiring, a defendant to raise any issues except constitutional ones.

At the trial, the same issue, whether or not the agent had defrauded the petitioner through his accountant, was submitted to the jury for its determination. In his charge, the judge stated explicitly that the question was not the understanding of the petitioner's accountant (R. 210). It was precisely that question which the petitioner sought unsuccessfully to raise at the time of his objections to the admission in evidence of Exhibit 20 and his request for a preliminary hearing (R. 124-125). These objections clearly distinguished the constitutional questions raised by the motion to suppress from the issue of admissibility which hinged on the proper characterization of Exhibit 20. Was it a confession? If so, the understanding of the petitioner and his accountant and the reasonableness and basis for their understanding were the crucial facts. If not, then the understanding of the petitioner and his accountant were irrelevant, as the judge instructed the jury. Just prior to counsel's statement of objections, the judge ruled that

the financial statement was not a confession.[3] This was the basis for denying the request for a preliminary hearing.[4] It was also the basis for the judge's instruction to the jury that it should ignore the understanding of the petitioner's accountant.

The distinction between the tests for rejection of evidence on the ground of its having been obtained in violation of Constitutional rights and on the ground of its being an improperly induced confession is well established. As stated in III Wigmore on Evidence (3rd ed., 1940) § 823:

> "Finally, a confession is not rejected because of any connection with the privilege against self-incrimination. The circumstances that this privilege protects against a disclosure which is compulsory, and that one of the tests for a confession is whether it is voluntary or not, have naturally led to the occasional use of both arguments at once by counsel in opposing the use of such a confession; but the Courts have properly kept the two principles distinctly apart. Thus, where a compulsory disclosure is offered, it may be admissible so far as the privilege against self-incrimination is concerned, and yet the question of its propriety as a confession may be raised. * * *"

The distinction as applied to the facts of the case at bar was spelled out in the first twelve of the petitioner's requests for instructions (R. 16-18). The second request was put in the language of *Bram* v. *United States*, 168 U. S.

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[3]This fact appears only indirectly in the record, in the prosecuting attorney's remarks (R. 125). But he stated the fact unequivocally. Note also the use of the past tense "argued" by defense counsel in his statement of objections (R. 124).

[4]Indeed, the prosecuting attorney would obviously have consented to such a hearing had the financial statement signed by the petitioner been characterized as a confession (R. 125).

532 and the third in the language of *Wilson* v. *United States*, 162 U. S. 613. However, these and other requests relating to confessions numbers 1, 4, 9 and 10 were irrelevant and immaterial in view of the judge's ruling that the financial statement signed by the petitioner was not a confession.

One of the main arguments of the petitioner urged upon the Court of Appeals was that the financial statement signed by the petitioner was a confession. The opinion of the Court seemed to treat it as a confession without designating it as such. For the first time in the case,[5] the Government has conceded in this Court (Govt. Br. 26) that the financial statement admitted an element of the alleged offense and at least approached a confession of guilt.

The Government's position rests on the premise that the issue of admissibility of a confession which the petitioner tried unsuccessfully to raise at the trial is identical to the issue of a violation of his constitutional rights which he raised before trial by a motion to suppress. The distinction between these issues is ignored throughout its argument, e.g., "the single assertion that there had been a promise of immunity" (Govt. Br. 39) and "petitioner had precisely the preliminary hearing he says was omitted [at the trial] on his motion to suppress." On this premise, the Government has described the petitioner's argument that he should have been granted a preliminary hearing at the trial as approaching the frivolous and resting upon a pointless request and an unsubstantial afterthought (Govt. Br. 21, 37, 44). The petitioner will prefer the Court's judgment as to the good faith and merit of his argument. The elaboration and clarification of this argument in the reply brief do not mean to raise points not already treated

[5] In its brief in opposition to the petition for a writ of certiorari, the Government took the position at page 12 that the financial statement "was plainly not a confession of guilt."

in the petitioner's main brief. In truth, this whole section of the reply brief is made necessary by the failure of the Government fairly to consider footnote 9 of petitioner's brief (Pet. Br. 28). By citing the *McNabb* case and the specific page of the *Lisbena* case,[6] petitioner distinguished the independent bases for the exclusion of confessions; he then stated his reliance upon the common law only.

The petitioner's failure to testify at the hearing on the motion to suppress is irrelevant. He was in no position to give testimony that would shed light on the question of the agent's state of mind. But on a hearing on the admissibility of a confession, the state of mind of the confessor and his agent would have been the crucial questions. As to them, the petitioner might well have testified.[7]

III. The *Stein* Case.

In answer to the petitioner's argument based on *Stein* v. *U. S.* 346 U. S. 156 (1953), that the case should be returned to the Court of Appeals for consideration of the sufficiency of the independent evidence on the hypothesis that the jury rejected petitioner's net worth statement, the Government relies, first, on the failure of the petitioner to request a specific instruction to acquit upon such rejection, and, second, on more general considerations of policy and procedure.

As to the latter point the petitioner feels that it is un-

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[6]The following quotation from *Lisbena* v. *California*, 314 U.S. 219, 236 appears at the page cited in petitioner's brief:

> "The aim of the rule that a confession is inadmissible unless it is voluntarily made is to exclude false evidence . . . The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."

[7]For an example of an occasion for such testimony, the petitioner was conferring with Delaney when agent McMahon phoned Delaney and asked if the petitioner would be willing to submit a check with the financial statement (R. 189).

necessary, even presumptuous, to attempt to explore before this Court the meaning of its decision in the *Stein* case. However, petitioner would like to express his hearty concurrence with the Government's statement that "the answer, compelled by practical necessities, lies in adherence to the rule that admissibility of evidence is a question for the court, not the jury" (Govt. Br. 50). In this case, the trial judge did *not* rule upon the admissibility of the statement; he submitted it to the jury for its decision on the question of admissibility. He did *not* rule that the statement was admissible; he said that he could not rule that it was not admissible, and thereupon passed the buck to the jury.[8] (R. 123-124.)

The conduct of the trial judge in this case points to the probable abdication by judges of their duty to rule upon the admissibility if they are to be permitted to pass that question on to the jury. As Professor Wigmore states, if the rule that admissibility is for the judge is to be accepted, this procedure is heresy. III Wigmore on Evidence (3rd ed. 1940) § 861. Superficially, it would appear that the procedure gave the defendant two chances to exclude the confession; actually as it develops it tends to deprive him of his opportunity to persuade the judge and leaves him to the jury alone. Perhaps this Court had these considerations in mind when it stated in the *Stein* case that the practice was "assumed" to be of advantage to the accused (346 U. S. at 189).

The Government has emphasized the fact that in the *Stein* case there was a specific request that the jury be instructed to acquit if it found the statement to have been coerced; it then states that the petitioner neither requested a "comparable" instruction nor asked the Court of Appeals to consider the sufficiency of the evidence apart from the admissions (Govt. Br. 45). This is called the "shortest

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[8]Counsel for petitioner objected to the failure of the trial judge to make his own decision on the question of admissibility (R. 125).

answer to petitioner's novel argument" (Govt. Br. 46).

First, in response to this contention, the petitioner only points to his understanding of the *Stein* case as expressed in his brief that the opinion there recognizes the necessity of an appellate court review of both the alternatives open to the jury (Pet. Br. 32-33). Also, petitioner must reiterate that this net worth statement was, at the trial, considered only to be an admission relating to the starting point; that the trial court was requested to instruct the jury on the Government's burden of proving a fixed starting point (Request 35 and 38, R. 22, 23); and that considering the context of the trial such a specific request would obviously have been futile.

This issue as to whether or not the *Stein* question was properly preserved below is closely allied to the fourth argument of the petitioner's brief. Since his primary defense was based on the insufficiency of the independent, circumstantial evidence, and since the prosecution was relying chiefly on that very evidence in both the trial court and the Court of Appeals, the possibility that the net worth statement would prove to be, in substance, the whole case against the petitioner was just not conceivable. In that setting such a specific request now said by the Government to be indispensable was also inconceivable.

IV. The Theories of the Case.

The petitioner feels, again in the light of the Government brief, that it would be advisable to restate the contrast between the theory of prosecution in the trial court and the theory upon which the Court of Appeals affirmed the conviction.

The case submitted to the jury, as the trial judge so instructed (R. 209, 211), was based on circumstantial evidence. The bulk of the testimony was of assets acquired by the petitioner and by his wife. There was considerable evidence as to the delivery of the net worth statement and

the circumstances leading up to and subsequent to that delivery, but there was virtually no evidence as to its contents.

The case stated by the Court of Appeals in affirming the conviction was based on a confession, i.e. the net worth statement, supplemented by oral admissions and corroborative evidence. The contents of petitioner's statement, to which so little reference was made at the trial, were found sufficient to establish his guilt.

It is true, as the Government so strongly emphasizes, that one of the petitioner's principal objections to the prosecution's presentation at the trial was based on its failure to allocate ownership of assets, its failure to show knowledge by petitioner of his wife's acquisition of assets or of the fact of taxable income sought to be inferred therefrom. In adopting the confession theory the Court of Appeals, far from merely finding an additional fact, found it unnecessary to consider these objections of the petitioner and made deceptively simple a very complex circumstantial case. This relatively simple case was, however, never presented to the jury.

In short, the petitioner never had an opportunity to defend against the confession case fashioned for the first time by the Court of Appeals, and never received a review of the circumstantial evidence case on which he was convicted.

Respectfully submitted,

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